(16)

No. 84-571

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

HARRY N. WALTERS, ADMINISTRATOR OF THE VETERANS ADMINISTRATION, ET AL.,

Appellants,

—v.—

NATIONAL ASSOCIATION OF RADIATION SURVIVORS, ET AL.,

Appellees.

BRIEF AMICI CURIAE OF THE AMERICAN CIVIL LIBERTIES UNION FOUNDATION AND THE AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF NORTHERN CALIFORNIA IN SUPPORT OF APPELLEES

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INTEREST OF AMICI

The American Civil Liberties Union is a nationwide, nonpartisan organization of more than 250,000 members, dedicated to preserving and protecting the fundamental liberties guaranteed in the Bill of Rights. The American Civil Liberties Union Foundation of Northern California is one of its state affiliates.

The American Civil Liberties Union has long worked to uphold the rights of individuals to the minimum procedural protections guaranteed by the due process clauses of the Constitution. With the consent of the parties, indicated by letters we have lodged with the Clerk of the Court, we file this brief amici curiae to bring our experience to bear on the important issues of due process and judicial review presented by this case.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case involves a challenge to a statute forbidding lawyers from charging more than $10 for representing a veteran seeking service-connected death and disability (SCDD) benefits from the Veterans Administration (VA). The statute has the effect of precluding veterans from retaining counsel in connection with disputes over service-related disability claims.

The government's defense of this de facto bar to retained counsel is premised on two disturbing conceptions of the relationship of the individual to the state that, if adopted by this Court, would work a jarring departure from accepted constitutional norms.

First, the government envisions a social welfare program in which the individual stands helpless before an omnipotent dispenser of governmental largesse. By

effectively excluding counsel, the government envisions a benefits determination process in which the individual veteran has no genuine opportunity to influence or challenge the premises of official decisionmaking. In fact, the effective exclusion of attorneys from the process only exacerbates the already unacceptably high risk of error in the Veteran's Administration disability determination process. SCDD claimants, who assert varying degrees of disability caused by injuries suffered in defense of our country, deserve better treatment from our government.

Second, the constricted vision of due process presented in the government's brief holds that "fundamental fairness" -- the touchstone of constitutional due process -- amounts to whatever the Congress and Executive Branch say it is. Moreover, the government proposes the remarkable notion

that the material facts of this litigation concerning procedural due process rights and First Amendment rights should be determined not by the courts, but by Congress. The government would have this Court make the delicate judgment whether the SCDD administrative system provides the minimum process that is due by examining the system as Congress intended it to operate rather than by examining the system as it actually operates today. Judicial deference to a congressional definition of due process in the abstract, divorced from facts and circumstances, which have informed this Court's modern procedural due process jurisprudence, would not only collapse the flexible balancing test now employed to make procedural due process determinations, but would also bring about an unwarranted shift in power away from the judicial branch to the legislative branch.[1]

ARGUMENT

I. The Government Misconceives the Relationship of the Individual to the State Embodied in the Due Process Clause of the Fifth Amendment.

The government's brief presents the anachronistic argument that Congress may, in establishing substantive criteria for public benefits, specify whatever procedures Congress deems adequate for determining which claimants fulfill the substantive criteria. U.S. Br. 32. The government's erroneous belief that Congress may burden statutorily created substantive rights with inadequate procedural protections has led the government to laud the qualities of the SCDD claims process as designed by Congress, rather than

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[1] Plaintiffs prevailed below on both their Fifth Amendment and First Amendment claims. Amici believe that they can be of most help to the Court by briefing the due process issue, on which the court below and the parties before this Court have focused. Amici's attention to due process in no way reflects our judgment on plaintiffs' First Amendment claims, which we believe are meritorious.

as it operates in the real world. The government thus improperly ignores the district court's detailed findings concerning the constitutional shortcomings of the SCDD process as measured by the traditional balancing test of Mathews v. Eldridge, 424 U.S. 319, 335 (1976).

A. Claimants Need Not Take "The Bitter With the Sweet." Rather, They Are Entitled to Constitutionally Adequate Procedures for Determining Eligibility for Benefits.

The right to due process reflects the fundamental constitutional requirement that the government must abide by fair procedures in determining the rights and duties of individuals within our society. Within this framework, the authors of the Fifth Amendment

> recognized the centrality of the concept of due process in the operation of this system. Without this guarantee that one may not be deprived of his rights, neither liberty nor property, without due process of law, the State's monopoly over techniques for binding conflict resolution could hardly be said to be acceptable

> under our scheme of things. Only by providing that the social enforcement mechanism must function strictly within these bounds can we hope to maintain an ordered society that is also just. It is upon this premise that this Court has through years of adjudication put flesh upon the due process principle.

Boddie v. Connecticut, 401 U.S. 371, 375 (1971).

In Logan v. Zimmerman Brush Co., 455 U.S. 422 (1982), the Court reaffirmed the enduring principle that the due process clause protects an individual seeking a statutorily conferred benefit from having to accept whatever process a government agency deems sufficient.[2] In Logan, the state Fair Employment Practices Commission failed to schedule a timely hearing and thereby extinguished Logan's employment discrimination claim. This Court held that

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[2] Cf. Gregory v. Town of Pittsfield, 53 U.S.L.W. 3616, 3616-17 (U.S. Feb. 26, 1985) (O'Connor, J., dissenting) (due process protects applicant for general assistance from arbitrary denial).

Logan was not obliged to accept the agency's error as all the process he was due. Rather, the due process clause required the state to provide Logan with a meaningful hearing before the state could finally deprive him of his property interest. Id. at 434-37.

The government's conception of due process -- that Congress may determine what process is due in the administration of the VA claims system, U.S. Br. 33-43 -- is simply the discredited rights-privilege dichotomy in new clothing. The government reasons in part that because VA disability benefits are mere "gratuities" paid from a noncontributory fund, U.S. Br. 32, then the due process clause permits Congress to enact attendant conditions or procedures that force claimants to "take the bitter with the sweet." Arnett v. Kennedy, 416 U.S. 134, 153-54 (1974) (opinion of Rehnquist, J.).[3] But the Court has repeatedly rejected that approach, both

in Arnett itself[4] and in subsequent decisions as well. Logan v. Zimmerman Brush Co., 455 U.S. at 432; Vitek v. Jones, 445 U.S. 480, 490-91 n.6 (1980). Instead, this Court has held that the government may not establish criteria for granting substantive rights and then ignore the dictates of due process in establishing procedures for determining which claimants are entitled to those substantive rights. See Little v. Streater, 452 U.S. 1 (1981); Wolff v. McDonnell, 418 U.S. 539

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[3] The government does not quote these now-famous words from the Arnett plurality opinion, but the government does cite to the passage from that opinion that seeks to provide a legal justification for the aphorism. See U.S. Br. 32.

[4] The opinion in Arnett to which the government cites and from which the above quotation is drawn was signed by only three Justices. Six Justices rejected this approach and instead found that the government employee in that case had a property interest in continued employment and a constitutional right to a hearing. Arnett v. Kennedy, 416 U.S. at 166-67 (opinion of Powell, J., joined by Blackmun, J.); id. at 177-78 (opinion of White, J.); id. at 210-11 (opinion of Marshall, J., joined by Douglas, J., and Brennan, J.). Only four Justices, however, required a pre-termination hearing.

(1974); Morrissey v. Brewer, 408 U.S. 471 (1972); Richardson v. Belcher, 404 U.S. 78, 81 (1971); Goldberg v. Kelly, 397 U.S. 254, 261-63 (1970).

B. The Effective Exclusion of Attorneys from the Claims Process Violates Due Process.

The government's incorrect view that Congress may force the beneficiaries of its munificence to take "the bitter with the sweet" has led the government to defend the SCDD claims process by adverting to the scheme that Congress wished to create rather than to the scheme as it operates in practice. As such, the government's description of the claims process is not supported by the facts presented to the district court and does not inform this Court's traditional due process analysis, namely, a balancing of factors under Mathews v. Eldridge, supra. More specifically, the government's analysis does not take into

account the alarmingly high probability of error[5] and the lasting consequences of that error caused by the fee limitation's effective exclusion of claimants' attorneys from a process that is not subject to judicial review and has no alternatives.

The flexible requirements imposed by the due process clause of the Fifth Amendment vary depending upon the factual context. E.g., Greenholtz v. Nebraska Penal Inmates, 442 U.S. 1, 12 (1979); Morrissey v. Brewer, 408 U.S. at 481. Although this lawsuit challenges only the fee limitation statute,

[5] Risk of error forms the second part of the Mathews balancing test. The first and third parts examine, respectively, the private interest and the government interest. 424 U.S. at 335.

Of course, the Mathews test for determining what process is due comes into play only for an individual who possesses a protectible property interest. In the present case, the district court found, and the government does not now dispute, that SCDD claimants (including both initial claimants and those claimants threatened with termination of benefits) who fulfill the statutory criteria for benefits have a protectible property interest in those benefits. See Mathews v. Eldridge, 424 U.S. at 332; Goldberg v. Kelly, 397 U.S. 254, 261-62 (1970).

38 U.S.C. § 3404(c), a veteran applying for SCDD benefits finds himself hemmed in by several related rules that restrict the veteran's capacity to present his claim for compensation for his service-connected disabilites. The entire web of rules affecting the disabled veteran's relationship with the VA are relevant in resolving this due process challenge against the fee limitation statute.

First, even though judicial review of administrative decisionmaking is the norm, see, e.g., Abbott Laboratories v. Gardner, 387 U.S. 136, 141 (1967); §§ 701-02 of the Administrative Procedure Act, 5 U.S.C. §§ 701-02 (providing generally for judicial review of agency action); 42 U.S.C. § 405(g) (providing judicial review of Social Security disability determinations), the disability decisions of VA adjudicators are final. Judicial review is precluded by statute. 38

U.S.C. § 211(a).[6] The absence of judicial review heightens the importance of fairness in the administrative process itself. In Mathews v. Eldridge, the Court held that pre-termination hearings were not necessary to afford due process to Social Security disability claimants, in part because of

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[6] See Johnson v. Robison, 415 U.S. 361, 367 (1974) (§ 211(a) precludes review of "decisions of law or fact that arise in the administration by the [VA] of a statute providing benefits for veterans....") (original emphasis); Ross v. United States, 462 F.2d 618, 619 (9th Cir.) (per curiam), cert. denied, 409 U.S. 984 (1972); DeRodulfa v. United States, 461 F.2d 1240, 1258 (D.C. Cir.), cert. denied, 409 U.S. 949 (1972).

The importance of judicial review as an error-correction mechanism is highlighted by the recent performance of federal courts in reviewing final Social Security disability decisions of the Secretary of Health and Human Services. Of the 10,618 appeals from benefits denials decided by federal district courts in Fiscal Year 1983, the courts reversed or remanded approximately two-thirds of the Secretary's decisions. See Social Security Administration, Office of Hearings and Appeals, ALJ and Hearing Office Statistics, FY 1983 at 25-26 (1,783 reversals; 5,198 remands). The recent performance of the Social Security Administration and the growing pressure on all sectors of the federal government to cut expenditures should make this Court wary of trusting the unreviewed administrative process to protect an individual claimant's interests.

their opportunity to present their cases in post-termination hearings and in appeals to federal district court. 424 U.S. at 349. By contrast, in the present case, no subsequent proceedings soften the impact of the lawyerless claims procedure.

Second, although in other contexts this Court has held that the availability of a tort remedy may provide all of the process that is due following the deprivation of a property or liberty interest, e.g., Hudson v. Palmer, 82 L.Ed.2d 393, 407-08 (1984); Parratt v. Taylor, 451 U.S. 527, 542-43 (1981); Ingraham v. Wright, 430 U.S. 651, 676-78, 682 (1977); Paul v. Davis, 424 U.S. 693, 711-12 (1976), no possibility exists for a disabled veteran to pursue his claim for compensation through a tort claim, because the Feres doctrine bars suit against the federal government under the Federal Tort Claims Act (FTCA), 28 U.S.C §§ 2671-80, for

injuries arising out of military service. Feres v. United States, 340 U.S. 135 (1950).

Third, even though the statutory preclusion of judicial review does not prevent plaintiffs from bringing constitutional challenges in federal court against elements of the SCDD statutory scheme, see Johnson v. Robison, 415 U.S. at 366-74, the fee limitation effectively prevents claimants from consulting attorneys concerning any aspect of a disability claim. Claimants are therefore unlikely to know whether they have potential constitutional claims that could be brought in federal court.

The SCDD process, therefore, has none of the usual safety valves generally attached to administrative processes designed to give content to participatory values and diminish the likelihood or consequences of bureaucratic error. It is against this

background of sharply limited alternatives that this Court should determine the fundamental fairness of the de facto exclusion of retained counsel from the administrative process.

Here, as in Goldberg v. Kelly, claimants do not assert a right to have appointed counsel to assist them in presenting their claims for benefits. Rather, plaintiff individuals and groups assert merely "that the [SCDD claimant] must be allowed to retain an attorney if he so desires." Goldberg v. Kelly, 397 U.S. at 270. The advantages for the welfare recipient represented by counsel at a welfare benefits hearing apply with full force to the SCDD claimant: "Counsel can help delineate the issues, present the factual contentions in an orderly manner, ... and generally safeguard the interests of the [claimant]. We do not anticipate that this assistance will unduly prolong or otherwise

encumber the hearing." Id. at 270-71. The government's wish to exclude attorneys from the SCDD process to maintain its "nonadversarial" nature has the inevitable effect of handicapping all but the most intelligent and well-organized claimants in their attempts to make cogent factual and legal presentations to the VA. The supposed goal of keeping the system nonadversarial thus serves the VA's administrative convenience by limiting the information presented to VA adjudicators and permitting the VA to control the decisionmaking apparatus without "interference" from attorneys. The exclusion of attorneys may promote administrative efficiency, but the latter has never been considered sufficient to justify a rule that so severely disadvantages a claimant in his attempt to prove his eligibility for public benefits. See Goldberg v. Kelly, 397 U.S. at 265-66;

cf. Carey v. Population Services International, 431 U.S. 678, 691 (1977) (ease of enforcement does not justify invasion of fundamental constitutional rights). In fact, the very conception of the due process clause is premised on the realization that the government simply cannot be trusted to decide important questions affecting the individual without subjecting itself to a process which assures the individual a meaningful opportunity to participate in the decisional process and to question the correctness of the government's assumptions. See Fuentes v. Shevin, 407 U.S. 67, 81 (1972).[7]

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[7] Even beyond the practical disadvantages suffered by a lawyerless claimant, exclusion of lawyers from the system may well create an appearance of injustice that tarnishes the legitimacy of the disability claims process. Just as forcing a lawyer on an unwilling criminal defendant "can only lead him to believe that the law contrives against him," Faretta v. California, 422 U.S. 806, 834 (1975), so preventing a lawyer from representing a willing SCDD claimant can only lead the claimant to doubt the integrity of the process.

As a fundamental premise, this Court has long recognized that "[t]he right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel." Goldberg v. Kelly, 397 U.S. at 270 (quoting Powell v. Alabama, 287 U.S. 45, 68-69 (1932)); see Gagnon v. Scarpelli, 411 U.S. 778, 786-87 (1973); In re Gault, 387 U.S. 1, 34-41 (1967). Even in the face of the foregoing axiom, the government concedes that the purpose and effect of the fee limitation statute is to exclude attorneys from the entire SCDD eligibility determination process. U.S. Br. 30-31.

The disadvantages suffered by the lawyerless claimant take many forms. As the district court's extensive findings clearly demonstrate, although the SCDD adjudicatory system may be informal and nonadversarial in theory, it is complex, chaotic, and error-prone in operation. Whatever the substance

and procedure of the VA disability claims system when Congress first enacted the fee limitation, claimants without legal counsel now face a bewildering variety of procedural traps, 589 F. Supp. at 1319, a diverse array of guiding precedents scattered in many sources (some unreported), id., regular attempts by the VA to induce claimants to waive their right to a hearing, id. at 1321, and complex substantive issues, id. at 1319-20.[8]

The government contends that despite the hurdles confronting a SCDD claimant, the non-legal representation offered by various veterans organizations provides claimants with effective advocates. However, as part of the present as-applied challenge,

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[8] Proving that a current disability was caused by a service-connected injury is especially difficult for certain modern causes as the toxic herbicide Agent Orange, atomic radiation, and post-traumatic stress syndrome. 589 F. Supp. at 1320.

plaintiffs adduced detailed, uncontroverted evidence of the inadequacies of the service organizations' representatives as substitutes for attorneys. The district court found that despite the best of intentions, the lay representatives lacked many critical skills and were "severely overburdened" by their caseloads. Id. at 1321-22.[9] The court similarly found that despite regulations requiring VA personnel to aid veterans in presentation of their claims, the VA's limited resources made such aid illusory. Id. at 1320-21.

This Court's decision in Goldberg v. Kelly sweeps away the government's contentions that service organization representatives and VA personnel provide

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[9] The consequences for judicial review of accepting the government's argument that the district court should not have considered evidence concerning the actual performance of service organization representatives, as well as other aspects of the SCDD process, are addressed in Part II infra.

sufficient support to the VA disability claimant in preparing and presenting his case. The welfare recipients in Goldberg v. Kelly were able to present their positions to agency adjudicators in part through welfare caseworkers. The Court found that the advocacy provided by the caseworkers left recipients without an effective voice. A recipient and caseworker, acting together, could generally not match a lawyer's ability to "delineate the issues, present the factual contentions in an orderly manner, conduct cross-examination, and generally safeguard the interests of the recipient," 397 U.S. at 270-71. Moreover, the caseworkers had conflicting interests in that they had gathered the facts on which the government's claim of ineligibility rested. Id. at 269. In the present case, VA adjudicators, who are employed by the agency that must pay benefits to any claimant deemed eligible, seek

simultaneously to play the disparate and often conflicting roles of advocate and decisionmaker.

Given the complexity of SCDD substance and procedure, the lack of judicial review or a tort remedy against the government, and the unintended shortcomings of VA personnel and service organization representatives, the government's picture of a benign, informal, nonadversarial system that works for claimants takes on a nightmarish air of unreality. Amici offer no criticism of Congress' initial desire to simplify the veterans' disability claims process. We simply contend that the complexity of the current decisional process is such that retained counsel is often essential to a veteran seeking to vindicate his or her most important property right. The due process clause does not permit a well-intentioned, but lumbering and error-prone bureaucracy

beset with personnel shortages and budgetary pressures to deprive claimants of critical property interests without giving claimants a meaningful opportunity to be heard. Eliminating the $10 fee limitation, thereby allowing claimants to be represented by counsel, would provide that opportunity and restore a modicum of fairness to the SCDD benefits process.

II. The Government Misconceives the Roles of Congress and the Judiciary in Procedural Due Process Challenges to Congressional Enactments.

The government would have this Court ignore the district court's findings based on detailed evidence demonstrating the fundamental unfairness of the SCDD claims process in practice. The government would instead have this Court defer to congressional "findings" concerning the purpose and impact of the fee limitation on the SCDD process. The government's position,

if accepted, not only would eliminate the heretofore accepted institutional obligation of the courts to make independent factual assessments in procedural due process cases, but would also collapse the due process analytical framework of Mathews v. Eldridge by requiring deference to the government's interests, as expressed in congressional findings, without consideration of individual interests and the risk of error under current procedures.

A. Courts Need Not Defer to Congressional "Findings" in a Procedural Due Process Challenge to an Administrative Scheme.

At least since Marbury v. Madison, 1 Cranch 137 (1803), the federal judiciary has exercised the power to review acts of Congress for compliance with constitutional standards.[10] While congressional enactments

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[10] See Garcia v. San Antonio Metropolitan Transit Authority, 53 U.S.L.W. 4135, 4145 (U.S. Feb. 19, 1985) (Powell, J., dissenting).

usually arrive at this Court with a presumption of constitutionality, see INS v. Chadha, 77 L.Ed.2d 317, 340 (1983), based in part on the respect due a coordinate branch of government whose members, like members of the judiciary, have taken an oath to uphold the Constitution, this Court has ultimate authority to determine whether a federal statute is constitutional. Id. at 338-39 & n.13; Buckley v. Valeo, 424 U.S. 1 (1976). Just as proper respect for the values of federalism has not led this Court to abdicate its responsibility to determine what process is due under the Fourteenth Amendment, e.g., Ake v. Oklahoma, 53 U.S.L.W. 4179 (U.S. Feb. 26, 1985); Santosky v. Kramer, 455 U.S. 745, 755 (1982); Vitek v. Jones, 445 U.S. at 491, so respect for the powers of a coordinate branch of the national government should not lead this Court to abdicate its responsibility to determine what process is

due under the Fifth Amendment. E.g., United States v. Nixon, 418 U.S. 683, 713 (1974) (requirements of Fifth Amendment due process override claim of executive privilege).

The government argues here that the Court must defer to congressional findings underlying the enactment and retention of the fee limitation statute, 38 U.S.C. § 3404(c). The government would have this Court ignore the district court's findings that the VA disability claims process does not match Congress' idealized version of an informal and nonadversarial system.[11] The district court found that in many respects

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[11] Thus, the heart of the government's due process argument, U.S. Br. 33-43, brushes aside the extensive record below by asserting that "Congress has determined that the VA claims system operates in a fair and nonadversarial manner, and the district court improperly failed to defer to that congressional determination." See also U.S. Br. 35 n.35 ("it was inappropriate for the district court to conduct an evidentiary proceeding in the circumstancer presented here"); U.S. Br. 22 ("the factual proceedings in the district court are irrelevant to a proper disposition of this case").

the statutorily compelled lack of an attorney rendered veterans unable to present their claims adequately and therefore greatly increased the risk of erroneous deprivations of benefits. 589 F. Supp. at 1315-23. The government understandably wishes to avoid both the district court's detailed findings and plaintiffs' compelling evidence concerning the actual operation of the SCDD claims process. But this Court's cases provide no support for the government's radical approach, which reads into cases decided under many different constitutional provisions and in widely varying factual contexts an overarching principle that courts must defer to congressional "findings" in reviewing the constitutionality of congressional legislation.

A proper reading of the diverse cases cited by the government reveals that the deference due Congress in judicial review of

a congressional enactment depends on the constitutional provision at stake and the nature of the statute under attack.[12]

The cases cited by the government involved specific reasons for deference not present in this case.[13] The goverment principally relies on cases involving: equal protection challenges where no suspect classifications, quasi-suspect

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[12] For instance, a statute containing an explicit racial classification or burdening First Amendment freedoms would come before this Court with a heavy burden of justification. E.g., Korematsu v. United States, 323 U.S. 214, 216 (1944); New York Times Co. v. United States, 403 U.S. 713, 714 (1971) (per curiam); Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 556-62 (1976). By contrast, a statute setting an age for mandatory retirement from the Foreign Service would warrant substantial deference from this Court to Congress. E.g., Vance v. Bradley, 440 U.S. 93, 97, 111 (1979).

[13] Compare Ruckelshaus v. Monsanto, 81 L.Ed.2d 815, 840 n.18 (1984) ("rational relationship" rest in Fifth Amendment takings context), and Kleppe v. New Mexico, 426 U.S. 529, 541 n.10 (1976) (deference to congressional authority under property clause of Art. IV, § 3 to protect wildlife on federal lands), with U.S. Br. 35 n.36 (citing Monsanto and Kleppe for principle of general deference to Congress).

classifications, or fundamental rights were at stake;[14] substantive due process challenges to statutes not affecting fundamental rights;[15] congressional action

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[14] See, e.g., Harris v. McRae, 448 U.S. 297, 322-25 (1980) (weighing competing interests under equal protection "rational relationship" test is congressional, not judicial, function); Vance v. Bradley, 440 U.S. at 111-12; see also Schweiker v. Wilson, 450 U.S. 221, 230 (1981).

In Vance v. Bradley, supra, from which the government has drawn a quotation concerning the need for judicial deference to Congress, U.S. Br. 35, this Court held that a mandatory retirement age for Foreign Service personnel did not violate the equal protection component of the Fifth Amendment due process clause, because the statute was rationally related to legitimate governmental goals. The Court explicitly limited its comments concerning deference to the context of "an equal protection case of this type." 440 U.S. at 111. An equal protection challenge on "rational relation" grounds looks not to actual facts but to whether Congress could have rationally concluded that certain facts were true. A procedural due process challenge, by contrast, entails a flexible balancing test that is sensitive to the facts and circumstances of the particular case. See infra, pp. 33-37.

[15] E.g., Brotherhood of Locomotive Firemen & Enginemen v. Chicago, R.I. & P.R.R., 393 U.S. 129, 138-39 (1968); Radice v. New York, 264 U.S. 292, 294 (1924); see also Ferguson v. Skrupa, 372 U.S. 726, 730-32 (1963); Williamson v. Lee Optical Co., 348 U.S. 483 (1955).

pursuant to its constitutional authority and relative institutional competence to legislate in the area of national security and military affairs;[16] and congressional action under the authority of Section Five of the Fourteenth Amendment.[17]

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[16] E.g., Rostker v. Goldberg, 453 U.S. 57, 64-65 (1981) (military draft); Middendorf v. Henry, 425 U.S. 25, 43 (1976) (summary courts martial); Communist Party v. Subversive Activities Control Board, 367 U.S. 1, 94-97 (1961) (protection of nation against foreign dangers).

In upholding male-only draft registration against a Fifth Amendment equal protection challenge in Rostker, this Court noted that Congress deserved added deference in cases in which it had specifically considered the constitutionality of a statute before enacting it. 453 U.S. at 64. The government has made no showing in the present case that Congress has given serious consideration to the constitutionality of the fee limitation statute.

[17] E.g., Fullilove v. Klutznick, 448 U.S. 448 (1980); Oregon v. Mitchell, 400 U.S. 112 (1970). However, this Court has held on many occasions that Section Five confers on Congress an additional grant of authority to enforce the substantive provisions of the Fourteenth Amendment. See, e.g., Fitzpatrick v. Bitzer, 427 U.S. 445, 455-56 (1976); Katzenbach v. Morgan, 384 US. 641, 651 (1966); Ex parte Virginia, 100 U.S. 339, 25 L.Ed. 676, 680 (1880). When Congress acts under Section Five, its enactments pass
[cont'd. on next pg]

In procedural due process cases, by contrast, deference to Congress is inconsistent with the Court's obligation to examine the facts and circumstances in making a context-specific determination. The flexible balancing test that has served as this Court's framework in resolving procedural due process challenges, see Mathews v. Eldridge, 424 U.S. at 335, envisions a far more active institutional role for courts than the government would admit. In Mathews, for example, the Court held that post-termination hearings for Social Security disability claimants satisfied due process not because that was the only process Congress provided, but rather because the Court determined that the

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constitutional muster so long as this Court determines that Congress could rationally have determined that the challenged provisions were appropriate methods for securing the guarantees of the Fourteenth Amendment. Katzenbach v. Morgan, 384 U.S. at 651. The VA fee limitation statute was of course not enacted under Congress's Section Five power.

Constitution did not require pre-termination hearings. The Court reached this conclusion only after thorough consideration of the facts concerning the actual operation of the Social Security disability claims process. See id. at 342, 345-47.

The government's view misconceives the role of judicial review by seeking to strip the courts of the power to find the adjudicatory facts on which constitutional decisionmaking depends. When general questions of legislative fact or "social fact" are at issue as they are in many equal protection and substantive due process cases, it may well be appropriate to defer to the legislature. However, when the adjudication of a case or controversy requires context-specific fact-finding, it has been clear, at least since United States v. Klein, 80 U.S. (13 Wall.) 128 (1872), that the proper performance of the judicial function requires independent judicial resolution of the facts.

B. Deference to Congressional "Findings" in This Procedural Due Process Challenge Would Collapse the Analytical Framework Established in Mathews v. Eldridge

This Court has repeatedly held that the procedural requirements mandated by the due process clause are flexible and vary according to the facts and circumstances of the particular case. See, e.g., Little v. Streater, 452 U.S. at 5 ("Due process, 'unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances.'") (quoting Joint Anti-Fascist Refugee Committee v.McGrath, 341 U.S. 123, 162 (1951) (Frankfurter, J., concurring)); Mathews v. Eldridge, 424 U.S. at 334; Morrissey v. Brewer, 408 U.S. at 481; Hannah v. Larche, 363 U.S. 420, 442 (1960).

Where, as here, plaintiffs challenge a statute "as applied," courts must consider the evidence presented by the parties to

inform the constitutional inquiry. "'[A] statute ... may be held constitutionally invalid as applied when it operates to deprive an individual of a protected right although its general validity as a measure enacted in the legitimate exercise of [legislative] power is beyond question.'" Little v. Streater, 452 U.S. at 16 (quoting Boddie v. Connecticut, 401 U.S. at 379).

For instance, a filing fee required to obtain a divorce, while "valid on its face, may offend due process because it operates to foreclose a particular party's opportunity to be heard." Boddie v. Connecticut, 401 U.S. at 380. The Boddie Court did not examine the Connecticut filing fee requirement in the abstract or as the state legislature had intended the fee requirement to operate, but rather as it actually affected female welfare recipients residing in Connecticut. Indeed, in Lassiter v. Department of Social Services,

452 U.S. 18, 31-32 (1981), this Court declined to set general due process guidelines for determining when provision of counsel is necessary in a parental status termination proceeding. Instead, this Court left that question to be answered by trial courts on a case-by-case basis (subject to appellate review). See also Gagnon v. Scarpelli, 411 U.S. at 790 (case-by-case determination of right to counsel at probation revocation hearings).

Given the highly fact-bound nature of procedural due process determinations, the government's contention that courts should refrain from receiving evidence as to the real-world impact of a congressionally mandated procedure is wholly inappropriate. The government's position, if accepted, would work a radical departure from the framework consistently used by this Court in procedural due process cases. Under the three-part test

set out in Mathews v. Eldridge, a court must examine: the individual interest that will be affected by official action; the risk of an erroneous deprivation and the probable value of additional or substitute procedural safeguards; and the government's interest. 424 U.S. at 335.

The government would collapse the Mathews balancing test by requiring courts to defer to the government's interest, as expressed by Congress in the statutory scheme establishing the challenged procedures. The first two elements of the Mathews test -- individual interest and risk of error -- would thus be eclipsed by the government's interest, and the balancing envisioned by Mathews would become a sterile exercise with a predetermined result in every case.

In a due process challenge, once a court has determined that a protectible interest does exist, the court's focus properly shifts

away from the legislative creation of the protectible interest to a determination of whether the procedures conferred by the legislature afford the minimum procedural protections required by the due process clause. This latter determination -- ascertaining what process is due -- is one that courts are uniquely qualified to make.

The district court in this case undertook a thorough balancing of the Mathews factors based on an extensive record. The evidence clearly supports the district court's factual findings and resulting legal conclusion that the fee limitation violates due process.

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted,

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